No. 86-1754

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WILBERT LEE EVANS,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

On Petition for a Writ of Certiorari to the Circuit Court of Alexandria, Virginia

---

PETITIONER'S REPLY BRIEF

ARTHUR F. MATHEWS *
THOMAS F. CONNELL
ANDREW J. MUNRO
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

JONATHAN SHAPIRO
1100 Princess Street
Alexandria, Virginia 22314
(703) 684-1700

Counsel for Petitioner

* *Counsel of Record*

June 5, 1987

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — Page

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1754

WILBERT LEE EVANS,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

On Petition for a Writ of Certiorari to the Circuit Court of Alexandria, Virginia [1]

PETITIONER'S REPLY BRIEF

I. EVANS' COUNSEL PROVIDED INEFFECTIVE ASSISTANCE ON APPEAL BY FAILING TO DISCOVER THAT EVANS' DEATH SENTENCE WAS BASED ON FALSE AND UNCONSTITUTIONAL EVIDENCE.

As respondent long ago admitted and petitioner has demonstrated (*see* Ptn. at 16-20), Evans was sentenced to death on the basis of evidence that the Commonwealth's prosecutor knew was false and inadmissible.

[1] Respondent's unsupported assertion (Respondent's Brief in Opposition at 1 n.1 ("Opp.")) that this Court "has no jurisdiction . . . to review the decision of a state trial court" was long ago rejected by this Court. *See Virginian Ry. Co. v. Mullens*, 271 U.S. 220, 221-22 (1926). *See also United States v. Richmond*, 177 F. Supp. 504, 506-07 (D. Conn. 1959), *aff'd*, 279 F.2d 170, 172 (2d Cir. 1960). *Cf. Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 159-60 (1954) (reviewing decision of intermediate state court when highest state court had summarily rejected petitioner's writ of error). If the Virginia Supreme Court's cryptic refusal to hear Evans' petition for appeal (App. 16a) is a decision on the merits, as respondent urges (Opp. at 10 n.7), then this Court of course has jurisdiction. Respondent does not contend otherwise.

Thus, the issue raised by the instant petition is not whether Evans was wrongly sentenced to death—the Commonwealth admits that he was—but whether Evans' court-appointed counsel were ineffective in failing to discover the Commonwealth's wrongdoing at a time when Virginia law barred capital resentencing. Acknowledging that appellate counsel's performance should be judged by the standards of *Strickland v. Washington*, 466 U.S. 668 (1984), respondent claims that Evans' counsel provided adequate representation both because the ten-month period of the direct appeal was too short for counsel to have discovered the Commonwealth's misconduct, and because in any event Evans ultimately received a second sentencing hearing, which "wiped the slate clean" of prejudice. (Opp. at 4-8). Both arguments are baseless.

In a case already characterized by shocking prosecutorial misconduct, respondent defends Evans' counsel's performance by blatant misstatement of the record facts. Contrary to respondent's contention, Evans' court-appointed counsel did not need "to go outside the trial record" to discover that Evans' death sentence was invalid. (Opp. at 7). The Commonwealth's *own prosecutor* has stated under oath that he informed Evans' defense counsel on the day of the sentencing hearing (April 17, 1981) that the Commonwealth's evidence was false. (App. 64a-72a; *see* Ptn. at 8, 17-18). Regardless of whether one credits that dubious and self-serving testimony, the trial record included clear, written documents that should have alerted Evans' counsel to the errors in the Commonwealth's evidence. On June 1, 1981—after Evans' conviction and prior to his appeal—counsel received, and claims to have read (*see* App. 62a), the Commonwealth's pre-sentence report. (App. 57a-60a). That report unmistakably showed that the most damaging "evidence" introduced by the Commonwealth at Evans' sentencing hearing was in fact false. (App. 58a; *see* Ptn. at 7, 19-20). No reasonably competent counsel who read the pre-sentence report—which was part of

the record throughout the ten months (from June 1, 1981 to March 22, 1982) that counsel represented Evans on appeal—could have failed to object on that basis to Evans' death sentence.

In a similar vein, respondent's suggestion that the flaws in Evans' death sentence were so obscure that "it took Evans' habeas counsel approximately one year" to discover and prove them (Opp. at 7) is an egregious misstatement of fact. As respondent well knows, habeas counsel began representing Evans in April 1982—shortly after this Court had denied Evans' first certiorari petition. Counsel immediately filed a habeas corpus petition (to stay Evans' execution), and within days thereafter discovered the errors in Evans' death sentence. One month later, in May 1982, habeas counsel filed an amended petition for a writ of habeas corpus specifically alleging that the conviction records (Commonwealth Exhibits 19-21) introduced by the prosecution at Evans' trial were false. *See Evans v. Commonwealth*, 228 Va. 468, 323 S.E.2d 114, 117 (1984), *cert. denied*, 471 U.S. 1025 (1985) (*"Evans II"*) (App. 34a). Moreover, on July 6, 1982—within three months of commencing the representation—habeas counsel filed a Bill of Particulars which specified eight separate flaws in Commonwealth Exhibits 19-21. (*See* Supp. App. at 113a).[2] That the Commonwealth's Assistant Attorney General Jerry Slonaker delayed nine more months before confessing error—while he and his colleagues from the Commonwealth Attorney General's office personally lobbied the Virginia legislature to pass emergency amendments to the death penalty statute which would permit capital resentencing (Supp. App. 115a-117a)—has no bearing on whether competent "appellate counsel could

[2] The Supplemental Appendix ("Supp. App.") is attached to this Reply Brief and is paginated to follow the Appendix already filed by Evans. The Commonwealth's recitation of the history of Evans' habeas corpus petition (Opp. at 7 n.5) studiously fails to mention either Evans' first amended petition of May 1982, or Evans' July 1982 Bill of Particulars.

have discovered and demonstrated the errors in the conviction records" (Opp. at 7) during the ten-month period when the case was on direct appeal.[3]

In sum, from the day the pre-sentence report was filed (June 1, 1981) through the denial of Evans' certiorari petition (March 22, 1982), the record available to appellate counsel unmistakably indicated that Evans had been sentenced to death on the basis of false evidence. Counsel's failure to discover or raise these obvious flaws on appeal fell far below the standard of conduct required by this Court in *Strickland* and *Evitts v. Lucey*, 469 U.S. 387 (1985).

Respondent's further contention that Evans suffered no prejudice from counsel's failure both defies common sense and rests on a misstatement of the law. It cannot seriously be disputed that if appellate counsel had proved, or the Commonwealth had conceded, the flaws in Commonwealth Exhibits 19-21 at any time prior to March 28, 1983—when, at the behest of Mr. Slonaker, the Commonwealth passed emergency legislation to permit capital resentencing proceedings—Evans' death sentence would automatically have been commuted to life imprisonment. *See Patterson v. Commonwealth*, 222 Va. 653, 283 S.E.2d 212 (1981). Contrary to the Common-

---

[3] The Commonwealth is also wrong in suggesting that the errors in Commonwealth Exhibits 19-21 were made "unbeknownst to the prosecution." (Opp. at 7 n.5, citing App. 48a). Although the Commonwealth's April 12, 1983 letter to the court confessing error (App. 48a) made that assertion, it was proved false by the subsequent testimony of the Commonwealth's chief prosecutor, John Kloch, who admitted that he knew in April 1981 that Commonwealth Exhibits 19-21 were flawed. *See Evans II*, 323 S.E.2d at 120 (App. 39a-40a; *see also* Ptn. at 8; App. 64a-72a). Moreover, in the September 1983 hearing, the author of the letter confessing error, Assistant Attorney General Slonaker, admitted that as early as January 1983—three months before he wrote the letter—he knew both that Commonwealth Exhibits 19-21 were false, and that Mr. Kloch was aware of their falsity when Kloch introduced them at the April 1981 trial. (Supp. App. 117a-119a). Thus, Slonaker's letter to the court confessing error was itself false.

wealth's contention (Opp. at 5-6 & n.3), nothing in *Evans II* even remotely suggests that the Virginia Supreme Court determined, as a matter of state law, "that *Patterson* would not have been applicable to [Evans'] case if his original death sentence had been vacated on direct appeal . . . ." (Opp. at 6). To the contrary, in *Evans II* the court held that as a matter of *federal* law the *ex post facto* clause of the United States Constitution did not preclude resentencing under Virginia's revised death penalty. *Evans II*, 323 S.E.2d at 118-19 (App. 35a-38a); *see id.*, 471 U.S. 1025, 1027 n.2 (Marshall, J., dissenting from denial of certiorari).[4] If Evans' counsel had acted competently during the course of the first appeal, there would have been no occasion to reach that issue, since a second death sentence would have been barred by existing state law. Counsel's failure to discover or challenge the flaws in Evans' death sentence, even in the face of a pre-sentence report which expressly demonstrated the falsity of the Commonwealth's evidence, caused lasting prejudice to Evans. (*See* Ptn. at 20).

II. PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN AT THE GUILT STAGE OF HIS TRIAL HIS COUNSEL FAILED TO OBJECT TO THE PROSECUTOR'S FALSE AND HIGHLY PREJUDICIAL SUMMATION.

As already demonstrated (Ptn. at 21-24), petitioner was denied the effective assistance of counsel at the guilt phase of his trial when his counsel took no action to rebut the prosecution's false suggestion that Evans was a multiple murderer. Ignoring every decision of this Court and of the Virginia Supreme Court concerning prosecutorial misstatements cited by Evans (*see* Ptn. at

---

[4] Respondent's selective quotation (Opp. at 5 n.3) from the Virginia Supreme Court's opinion in *Evans II* omits by ellipsis critical language from the opinion which flatly contradicts respondent's interpretation of that case. *Compare* Opp. at 5 n.3 (respondent's excerpted version of *Evans II*) *with* App. 36a (actual opinion of the Virginia Supreme Court).

23-24 & n.25), respondent contends that "[t]he prosecution did not argue . . . that Evans had, in fact, killed other people." (Opp. at 8 n.6). That contention is flatly at odds with the actual language used by the prosecutor, who stated: "Two witnesses said [Evans] had nothing to lose; *he'd killed people in North Carolina . . . . He told people he killed people* and was facing life imprisonment in North Carolina." (App. 56a (emphasis added); *see* Ptn. at 6 n.4). Regardless of whether the prosecutor intended to "couch[]" his argument "in terms of comments upon evidence of Evans' 'motive,'" as respondent contends (Opp. at 8 n.6), the prosecutor falsely stated that Evans either was, or had admitted to being, a multiple murderer.

Likewise, respondent is wrong in suggesting that the prosecutor's remarks were merely "comment[s] upon adverse evidence which had been admitted over [Evans'] objection." (Opp. at 9). There was no such evidence, and none is cited in either respondent's Brief or the opinion below. The only testimony even remotely relevant that was offered by the prosecution, over objection, came from two inmate witnesses, Ralph Washington and Anthony Jasper. They testified about oral statements allegedly made by Evans on the night before the shooting. *But neither witness said a word about Evans' having "killed people in North Carolina."* (*See* App. 56a).[5]

---

[5] Reaching beyond anything suggested in the habeas court below, the Commonwealth now claims that the prosecutor's summation referred to Defendant's Trial Exhibit A-1 (Opp. at 5a), which is a pre-trial written statement given to the police by inmate Washington. But clearly the prosecutor was not referring to that Exhibit, since it was made by only *one* witness, not two; and was sponsored by the *defendant*, without objection from the prosecution, for the limited purpose of impeaching Washington's assertion at trial that Evans had said he would kill anyone who prevented his escape. Moreover, the trial court carefully instructed the jury that the entire Exhibit was admitted "not to prove the truth of the statements contained in [it], but rather to prove that *this witness* [*Washington, not Evans*] made the statement [*i.e.*, Defend-

In short, there was no evidence before the jury that Evans had either previously killed anyone (for in fact, he had not), or had said that he had done so. The prosecutor's deliberate, repeated misstatement about this crucial matter contravened the trial court's earlier instructions and denied Evans the right to a fair trial. (*See* Ptn. at 23-24 and cases cited therein). No "strategic decision" (*see* Opp. at 9) by counsel could possibly justify the failure either to object to the misstatement or to request a curative instruction.

III. EVANS' CHALLENGE TO THE UNCONSTITUTIONAL USE OF PRIOR TRANSCRIPT AT HIS RESENTENCING PROCEEDING IS NOT BARRED BY PROCEDURAL DEFAULT.

Respondent does not seriously dispute that Virginia's longstanding practice of permitting the prosecution to introduce the prior transcript testimony of adverse witnesses at capital resentencing proceedings violates the decisions of this Court and conflicts with the decision of at least one other state court. (*See* Ptn. at 24-28; Opp. at 12-13).[6] Rather than argue the merits of Virginia's

---

ant's Exhibit A-1] on the occasion in question." (Supp. App. 120a) (emphasis added).

In the evidentiary hearing below respondent never contended that the prosecutor's summation referred to Defendant's Exhibit A-1. Moreover, the habeas trial judge found that the summation referred to the "live testimony" of Washington and Jasper that "had been objected to by defense counsel at the time of its introduction, but to no avail." (App. 12a-13a). Respondent first proffered the theory that the prosecutor was referring to the defendant's own Trial Exhibit A-1 when resisting Evans' petition for review before the Virginia Supreme Court.

[6] Respondent's sole contention on the merits is that under *Ohio v. Roberts*, 448 U.S. 56 (1980), the Confrontation Clause is not offended where a defendant "had the opportunity to confront and cross-examine the witnesses in question when they testified at his original trial." (Opp. at 13). In *Roberts*, of course, the prosecution demonstrated that the witness was in fact unavailable—unlike here. The Court stated, however, that "[i]n the usual case (*including cases where prior cross-examination has occurred*), the prosecution

flawed procedure,[7] respondent contends that this Court is barred from reviewing the matter by the doctrine of procedural default. (Opp. at 10-12). That argument rests on a tortured misreading of the decision below.

No amount of *ipse dixit* can transform the state habeas judge's dismissal of the claims in Evans' petition " 'for the reasons stated in the respondent's answer' " into, as respondent claims, a "clear dismiss[al]" of Evans' Confrontation Clause claim "primarily for the procedural default, and only alternatively on the merits." (Opp. at 11). Not only is it not "clear" that the dismissal of this claim was "primarily" for procedural reasons, it is not clear that the dismissal rested on procedural grounds *at all*.[8]

---

must either produce or demonstrate the unavailability of the declarant whose statement it wishes to use against the defendant." *Id.*, 448 U.S. at 65 (emphasis added). Respondent's reliance (Opp. at 13) on *United States v. Inadi*, 106 S. Ct. 1121 (1986), is similarly misplaced. While refusing to adopt the "radical proposition" that *Roberts* be applied to "co-conspirators' out-of-court statements," *id.* at 1126, the Court in *Inadi* reaffirmed the *Roberts* rule, stating: "[W]hen the prosecution seeks to admit testimony from a prior judicial proceeding in place of live testimony at trial[,] . . . before such statements can be admitted the government must demonstrate that the declarant is unavailable." *Id.* at 1125.

[7] Respondent's suggestion that Evans' habeas counsel "clearly did not desire that the witnesses be present" (Opp. at 13) is both unsupported and untrue. At the resentencing proceeding counsel was well aware that settled Virginia law authorized the prosecution to introduce prior transcript testimony without compelling the live appearance of the witnesses. The trial judge had made clear that he would permit no challenge even to portions of the transcript testimony (*see* Ptn. at 11 n.12; App. 95a); objecting to the use of the entire transcript would have been an exercise in futility that the trial judge would undoubtedly have regarded as frivolous. Respondent's suggestion (Opp. at 12-13) that Virginia state law permits defendants to compel the presence of adverse inmate witnesses is beside the point; the decisions of this Court establish that in this case the prosecution had the burden of compelling their appearance. *See* note 6, *supra*.

[8] The habeas judge's one-sentence ruling dismissed more than a dozen separate claims by petitioner. Carried to its logical conclu-

At best, respondent can show only a possibility that the "ambiguous [and] obscure" determination of Evans' confrontation claim by the state court, *see Michigan v. Long*, 463 U.S. 1032, 1041 (1983), in fact rested on procedural grounds. But as this Court has held, to close the door to federal review "the state court must *actually* have relied on the procedural bar as an independent basis for its disposition of the case." *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985), citing *Ulster County Court v. Allen*, 442 U.S. 140, 152-54 (1979) (emphasis added). And to show such reliance Judge Kent's ruling would have had to contain what is *not* present here: "[a] clear or express indication that 'separate, adequate, and independent' state-law grounds were the basis for the court['s] judgment." *Caldwell*, 472 U.S. at 327, quoting *Michigan v. Long*, 463 U.S. at 1041. Under these decisions, which respondent does not even discuss, there is no procedural bar to review of Evans' Confrontation Clause claim.

IV. EVANS' CLAIM CONCERNING THE LIKELIHOOD OF BIAS BY THE HABEAS JUDGE RAISES A SUBSTANTIAL FEDERAL ISSUE UNDER THE DUE PROCESS CLAUSE.

As Evans has already demonstrated (Ptn. at 28-30), the state habeas judge had a longstanding professional and personal relationship with Evans' trial counsel, Mr. Brown, whose professional competence and veracity were the central issues in the proceeding below. Under these circumstances, it was unlikely that Judge Kent could be a "neutral and detached" decisionmaker, as the Due Process Clause of the United States Constitution requires. *See Morrissey v. Brewer*, 408 U.S. 471, 489 (1972).

---

sion, respondent's argument would suggest that the habeas judge dismissed each of these claims for each and every reason stated in respondent's Answer. Fairly read, Judge Kent's ruling means only that in his view the Answer contained sufficient arguments or "reasons" to warrant dismissal of the various claims in Evans' petition; the ruling does not state *which* of those reasons Judge Kent actually relied on.

Apart from a hypertechnical discussion of the details of Mr. Brown's employment status,[9] respondent's principal contention is that questions concerning the alleged bias of a state habeas judge are "at most, a matter of state law" which this Court is "without jurisdiction" to review. (Opp. at 14). That contention is foreclosed not only by the decisions of this Court cited in the Petition (which respondent fails even to mention), but also by *Aetna Life Insurance Co. v. Lavoie*, 106 S. Ct. 1580 (1986), upon which respondent relies. Although the Court in *Aetna* stated that evidence of a judge's "general frustration with insurance companies" would not by itself bar him from hearing all cases in which such companies are a party, *id.* at 1585, it reversed on due process grounds a state Supreme Court ruling because one of the nine appellate judges had a potential financial interest in the outcome of the case. *Id.* at 1586-87. The Court held that recusal is required where sitting on the case " 'would offer a possible temptation . . . to the average [judge]' " to favor one party over the other. *Id.* at 1587 (citation omitted).

In the circumstances of this case, Judge Kent's long-standing professional and personal relationship with Mr. Brown would offer such a possible temptation " 'not to hold the balance nice, clear and true.' " *Aetna*, 106 S. Ct. at 1587 (citation omitted). That Evans' claim presents a substantial federal question is doubtless; the trial court's, and respondent's, inability to recognize it as such suggests that it is an important one as well.

---

[9] Regardless of whether, as a matter of state law, Mr. Brown was a "constitutional officer entirely independent of the judiciary," as respondent contends (Opp. at 13 n.10), it is undisputed that for a period of three years Brown performed important judicial functions under the supervision and direction of Judge Kent. (*See* Ptn. at 14-15, 28-30). In this sense, Mr. Brown's employment status was no different than that of a law clerk to a federal judge. *See United States v. Ferguson*, 550 F. Supp. 1256 (S.D.N.Y. 1982) (Weinfeld, J.).

CONCLUSION

For the foregoing reasons, and those stated in the Petition, petitioner prays that a writ of certiorari issue to review the decision below.

Respectfully submitted,

ARTHUR F. MATHEWS *
THOMAS F. CONNELL
ANDREW J. MUNRO
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

JONATHAN SHAPIRO
1100 Princess Street
Alexandria, Virginia 22314
(703) 684-1700

Counsel for Petitioner

* *Counsel of Record*

June 5, 1987

SUPPLEMENTAL APPENDIX

SUPPLEMENTAL APPENDIX

EXCERPT FROM PETITIONER'S BILL OF PARTICULARS (FILED JULY 6, 1982)

The petitioner, Wilbert Lee Evans, sets forth the following particulars concerning the claims in his amended complaint:

1. "The specific evidence that was available for presentation at the sentencing phase of the trial which defense counsel did not present, and whether petitioner brought such evidence to the attention of his attorneys. (See allegation 17(a) of the amended petition).

ANSWER: The following evidence was available for presentation to the jury at the sentencing phase of petitioner's trial:

a. The testimony of the petitioner (then defendant), Wilbert Evans. Evans . . . would have testified about the nature of the previous offenses offered into evidence by the Commonwealth (see discussion below), and, in particular, that, in fact, he was not convicted of assaulting a police officer with a deadly weapon.

* * * *

h. A certified abstract of proceedings before the Superior Court for Lake County, North Carolina, indicating that petitioner was not convicted of assault on a police officer, and that in fact, the charge was nolle prossed. Had objection been made to introduction of this proported conviction, and had it been sustained, this document would not have been offered into evidence.

i. The testimony of the Clerk of Court of the Superior Court of Wake County, North Carolina, or his duly authorized representative. This official could have explained to the jury that:

1. The July, 1964 conviction for assault on a police officer with a deadly weapon had been nolle prossed upon appeal;

2. That the July, 1964 conviction for an affray with a deadly weapon was appealed, resulting in a trial de novo, thus making the conviction in the City Court of Raleigh a nullity;

3. That the "Commitment to State Prison" dated February 21, 1964, (part of Commonwealth's Exhibit 21) was for an offense reflected in another document presented to the jury, and was not for a separate conviction;

4. That the "Commitment to State Prison Department Prison Unit" form dated September 30, 1964, was for an offense reflected in another document presented to the jury, and was not for a separate conviction;

5. That the "Judgment and Commitment" form dated December 15, 1970 (part of Commonwealth's Exhibit 19) was for an offense reflected in another document presented to the jury, and was not for a separate conviction;

6. That the two, single column "Judgment" forms dated December 15, 1970 (part of Commonwealth's Exhibit 19) were for the same offense, and were for an offense reflected in another document presented to the jury, and were not for separate offenses;

7. That the "Judgment and Conviction" form dated July 12, 1972 (part of Commonwealth's Exhibit 20) was for an offense reflected in another document presented to the jury, and was not a separate offense;

8. That the "Indictment—Assault With Intent To Kill", undated, was the charging document for an eventual conviction for assault with a deadly weapon inflicting serious injuries, itself reflected in a second document dated September 27, 1972, received by the jury, and was not a separate offense.

All of the above information (a-i) was known to, should have been known to, or was brought to the attention of trial counsel by the petitioner and was available at the time of the sentencing hearing.

* * * *

EXCERPT FROM HEARING OF SEPTEMBER 21, 1983 (TESTIMONY OF JERRY P. SLONAKER):

[147] Whereupon,

JERRY P. SLONAKER,

was called as a witness by and on behalf of the Commonwealth of Virginia, and, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. KLOCH:

Q Would you please state your full name and your occupation and how long you have been employed by the Attorney General's Office.

A Jerry P. Slonaker, Assistant Attorney General. I've been employed as an Assistant Attorney General, Criminal Division, since July of 1975.

Q And you were the Assistant that handled the direct [148] appeal and *habeas corpus* on the case we are dealing with today?

A That's correct.

Q Mr. Slonaker, I want to go over a couple of things that occurred during the pendency of this case, as well as what your involvement was in Senate Bill 12 [amending the Virginia death penalty statute to permit capital resentencing]. You're familiar with Senate Bill 12?

A Yes, I am.

Q Could you give the Court, please, a history in terms of your involvement, if any, in Senate Bill 12?

A Senate Bill 12 was essentially drafted a year before it was introduced. It was drafted by Jim Culp of our office. For reasons unknown to me, it was not introduced or, if it was introduced, it never got out of committee.

Q In the '82 session?

A That's correct.

Subsequently, not too long before the memorandum which I prepared on September 9th, [1982] the Deputy Attorney General in charge of the Criminal Division came to me and Jim Culp and indicated to us he was interested in having this bill introduced and he wanted Jim Culp and I to prepare a memorandum explaining the purpose of the bill and outlining the various reasons why it should be introduced.

[149] Q And was that done?

A It was done, that's correct.

Q All right.

And this was proposed as emergency legislation, was it not?

A That's right.

Q For what reason was that?

A Well, it had been a year since—really over a year since the Patterson case had been decided. All of us working in the *habeas* section felt that this was a problem that needed to be addressed. We were quite aware that in every capital murder case in Virginia there has been a major attack made collaterally with *habeas corpuses*, especially to the sentencing phase of the trial. This left the situation it allowed as to what an appropriate remedy was. The Patterson case was open to some interpretation, but it appeared to us to be a significant problem. . . .

* * * *

[150] Q How about after that, Mr. Slonaker, what involvement did you have in Senate Bill 12?

A I took the bill that Jim Culp had drafted, sat down with him. I think we made a few polishing changes to it, but it was essentially as he had drafted.

Q In 1981?

A '81.

I then worked with him to prepare the memorandum fro [sic] Don Geering, as per his request, to lay out why we felt legislation was needed and why it was needed as emergency legislation.

Q September 9th, 1982?

[151] A That's correct, right.

Q Okay.

After that particular memorandum, did you have any other input in Senate Bill 12?

A Yes, I did. Mr. Geering, as Deputy in charge of the Criminal Division, has primary responsibility on all legislation drafted by this division. He does, however, on all bills have some backup people, because occasionally he's required to be out of town and unavailable. So, he asked Jim Culp and I to be the backup for that bill.

Now, I had some further involvement if you want me to go into that.

Q All right.

A The bill was called before the Senate Court of Justice Committee. I think that was on January 19th. Jim Culp was going to testify before the Senate committee. He asked that I accompany him to the Senate committee so that I could—we could put our heads together if any question came up. He was to do the testimony. He did that. Subsequently, I was advised by the House to appear to testify. I did appear one date. The bill was not called. I had to go out of town and Jim Culp appeared, but I don't think he testified. I think the bill passed without any testimony [152] being given in the House.

• • • •

[162] THE COURT: You may examine.

CROSS-EXAMINATION

BY MR. LABOWITZ:

Q Mr. Slonaker, my name is Ken Labowitz.

When was the first time you became aware of, for lack of a better term, the C, D, and E problem in this case [concerning the erroneous convictions in Commonwealth

Exhibits 19-21], the two misdemeanors that became one misdemeanor resolution in the Circuit Court?

A When the *habeas corpus* petition was filed.

Q Does that mean the second one, in the spring of '82?

A I believe that's correct.

Q And the third *habeas corpus* in January of '83 then raised the separate issue of the uncounselled misdemeanors?

A That's right. Also, clarified some other allegations, one of them being a claim under *Estell* versus *Smith*, but yes, that's correct.

* * * *

[167] Q In the discussions that you had—Strike that. When did you first become aware the prosecutor's office, Commonwealth Attorney's Office in Alexandria had been aware prior to trial of the C, D, E problem?

[168] A The awareness was just what John Kloch testified to here today.

Q When you're saying awareness, it's kind of a loaded question. I mean your awareness.

A The way you asked the question, what I'm trying to say is I contacted John Kloch after the petition was filed. . . .

* * * *

A The petition was filed and I recall sending a copy of the petition to Mr. Brown, Mr. Long, and I think Mr. Kloch if he didn't already have a copy. I know I provided copies of all petitions, as they were filed, to Mr. Long, Mr. Brown, and Mr. Kloch.

Q And at that point something happened?

A I don't know the exact dates when I talked to John [Kloch]. I know I spoke to him on the telephone on a number of [16?] occasions. I met with him at his office on one or two occasions. I just don't recall the precise date.

Q And when was it you first became aware of the Commonwealth Attorney's Office, the collective knowl-

edge of the C, D, E error prior to—Let me rephrase all of that.

When did you become aware that Mr. Kloch and Mr. Sengel [assistant to Mr. Kloch] had been in possession of the C, D, E problem, knowledge of the C, D, E problem? As we've heard today, they said they told Mr. Long and Mr. Brown about that. When did you first become aware that Mr. Kloch and Mr. Sengel had that information at the time they said they had it?

A I'm not sure. I just don't recall.

Q Sometime prior to today?

A Certainly.

Q Sometime prior to January 1983?

A I would think so.

* * * *

EXCERPT FROM TRIAL TRANSCRIPT OF APRIL 16, 1981

(EXAMINATION OF COMMONWEALTH'S WITNESS RALPH WASHINGTON):

[327] THE COURT: Let me see the statement for a moment before he's excused [*i.e.*, Washington].

Ladies and gentlemen of the jury, the statement is marked as Exhibit Defendant's A and it's admitted not to prove the truth of the statements contained in the statement, but rather to prove that this witness made the statement on the occasion in question. The witness may be excused.

(Whereupon, at 11:50 a.m., the witness was excused.)

* * * *